No. 48504-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMIN LEE SCHIPPER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn J. Nelson

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

At his trial for first degree robbery, Jamin Schipper admitted stealing beer from a store but denied his actions constituted robbery. Over his repeated sustained objections, the prosecutor continued to commit misconduct in closing argument. In his appeal of the subsequent jury verdict of second degree robbery conviction, Mr. Schipper asks this Court to find the prosecutor's misconduct had a substantial likelihood of affecting the verdict, and as a result, his conviction must be reversed.

B. ASSIGNMENT OF ERROR

Mr. Schipper's constitutionally protected right to a fair trial was violated by repeated instances of prosecutorial misconduct.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under the due process clauses of the Washington and United States Constitutions, a defendant is guaranteed the right to a fair trial. Prosecutorial misconduct in closing argument, which prejudices the defendant, violates that right to a fair trial and requires reversal of the convictions. Over Mr. Schipper's sustained objections, the prosecutor trivialized the State's burden of proof, vouched for the veracity of its witnesses, and appealed to the passions and prejudices of the jury. Was

there a substantial likelihood that the misconduct affected the jury's verdict, thus requiring reversal of Mr. Schipper's convictions?

D. STATEMENT OF THE CASE

Appellant Jamin Schipper was seen inside the Saar's Marketplace in Lakewood around 4 p.m. on August 10, 2015, singing loudly as he walked around the store. RP 175, 252. Shoppers and one of the store's clerks watched as Mr. Schipper walked out of the store without paying for a mini keg of Heineken beer and a 24 pack of bottled beer. RP 176-77, 252.

The clerk, Tiffany Kellogg, followed Mr. Schipper into the store's parking lot, telling Mr. Schipper if he gave the beer to her she would not call the police. RP 179, 184. According to Ms. Kellogg, as she got approximately three feet from Mr. Schipper, he swung the mini keg at her, and told her he had a gun and was going to shoot her. RP 185. Ms. Kellogg and other employees that followed her backed away and abandoned attempts at retrieving the items from Mr. Schipper. RP 186.

Approximately 20-30 minutes later, following calls to the police by Saar's employees, Mr. Schipper was arrested. RP 166, 284. One of the arresting officers opined that Mr. Schipper was "severely

intoxicated." RP 284. Mr. Schipper was subsequently charged with first degree robbery with a deadly weapon enhancement, and felony harassment. CP 1-2.

At trial, Ms. Schipper admitted taking the beer from the store without paying for it, intending to steal it. RP 289. He also admitted being mildly intoxicated. RP 292.

On four separate occasions during the prosecutor's closing and rebuttal arguments, the court sustained Mr. Schipper's objections to the prosecutor's arguments. *See* RP 314, 348-49, 351.

The jury subsequently found Mr. Schipper guilty of the lesser degree of second degree robbery with a deadly weapon enhancement, and the lesser included offense of misdemeanor harassment. CP 9-15.

E. ARGUMENT

1. **The repeated instances of sustained misconduct by the prosecutor was so prejudicial, reversal of Mr. Schipper's convictions is required.**

   a. *Prosecutorial misconduct violates a defendant's constitutionally protected right to a fair trial.*

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 3 and article I, section 22 of the Washington Constitution guarantee the right to a fair trial. *State v. Finch,* 137 Wn.2d 792, 843, 975 P.2d 967, *cert. denied,* 528 U.S. 922

(1999). Prosecutors represent the State as quasi-judicial officers and they have a "duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher,* 165 Wn.2d 727, 746, 202 P.3d 937 (2009). "A '"[f]air trial" certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.'" *State v. Monday,* 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (alteration in original), *quoting State v. Case,* 49 Wn.2d 66, 71, 298 P.2d 500 (1956). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport,* 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

The prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). Because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence,"

appellate courts must exercise care to insure that prosecutorial comments have not unfairly "exploited the Government's prestige in the eyes of the jury." *United States v. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). Because the average jury has confidence that the prosecuting attorney will faithfully observe his or her special obligations as the representative of a sovereign whose interest "is not that it shall win a case, but that justice shall be done," his or her improper suggestions "are apt to carry much weight against the accused when they should properly carry none." *Berger*, 295 U.S. at 88.

To establish that the prosecutor committed misconduct during closing argument, the defendant must prove that the prosecutor's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011).

Finally, Mr. Schipper was not required to request a curative instruction since he timely objected, thus properly preserving the issue for appeal. *Allen*, 182 Wn.2d at 375; *State v. Classen*, 143 Wn.App. 45, 64, 176 P.3d 582 (2008).

b. *The prosecutor committed multiple instances of misconduct in the rebuttal argument.*

At trial, Mr. Schipper did not deny culpability, rather, he disputed the degree of the crime charged, arguing the jury should convict only on theft as opposed to the charged offense of robbery. In his closing argument on four different occasions, the prosecutor committed misconduct. The trial court sustained Mr. Schipper's objections.

i. The prosecutor trivialized the burden of proof.

During rebuttal argument, the prosecutorial trivialized the State's burden of proof and the court sustained Mr. Schipper's objection to this misconduct:

> Beyond a reasonable doubt. That's Jury Instruction Number 4, and it's the last paragraph that really gives you the definition. "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."
> . . .
> And [jurors] struggle with it, and rightfully so, because it's a difficult concept. *But let me suggest to you, if you believe something in your heart, in your gut, in your mind, you're there.*

RP 351 (emphasis added).

"Due process requires the State to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged." *In re Winship,* 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Misstating or trivializing this burden is misconduct. *In re Pers. Restraint of Glasmann,* 175 Wn.2d 696, 711, 713, 286 P.3d 673 (2012). "Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant' s guilt beyond a reasonable doubt. *Id.*

The prosecutor's statements that the jury could convict if they "believe something in your heart, in your gut, in your mind, you're there" improperly minimized the State's burden of proof. This was a serious misstatement of the law. A person can "think" or "feel" that a defendant "did it" whether or not the State has proven all elements of the charged crime beyond a reasonable doubt. The prosecutor's argument was prohibited and his conduct improper.

ii. <u>The prosecutor impermissibly vouched for the credibility of its witnesses.</u>

The prosecutor's argument also vouched for the credibility of the State's witnesses inferring Mr. Schipper's testimony was not credible:

> Now, if you want to believe his version of it, that's fine. What that means is he's guilty of theft third. Okay. If you believe his version. There is not a person in this room that's going to believe that. *You heard it from too many witnesses. They were credible witnesses.*
> . . .
> *They are not here with an ax to grind against anybody.*

12/2/2015RP 314 (emphasis added). Again the court sustained Mr. Schipper's objection.

It is improper for a prosecutor to personally vouch for a witness's credibility. *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121 (1996); *State v. Jackson*, 150 Wn.App. 877, 883, 209 P.3d 553, 557 (2009). A prosecutor is guilty of improperly vouching when he expresses his personal belief regarding the veracity of the witness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). *See also State v. Warren,* 165 Wn.2d 17, 30, 195 P.3d 940 (2008) ("It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness."). Whether a witness has testified truthfully is entirely for the jury to determine. *Ish*, 170 Wn.2d at 196.

Here, the prosecutor's characterization that the witnesses did not have "an axe to grind" constituted a personal opinion about the credibility of those witnesses.

iii. The prosecutor improperly appealed to the passions and prejudice of the jury.

The prosecutor has a duty to seek verdicts that are free from appeals to passion or prejudice. *State v. Hoffman,* 116 Wn.2d 51, 95, 804 P.2d 577 (1991); *State v. Rafay,* 168 Wn.App. 734, 829, 285 P.3d 83 (2012), *review denied,* 176 Wn.2d 1023 (2013). Appealing to the jury's "passion and prejudice" through the use of inflammatory rhetoric encourages jurors to render a verdict based on considerations other than admitted evidence. *State v. Belgarde,* 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

The prosecutor did just that here, appealing to the passions and prejudices of the jury:

> Number one is team work. You're a team. You may not think of it that way yet, but by the time you're done, you're going to realize, because you came in here with a goal, and *every one of you came in here with the same goal, and that's to do justice. There's not a person in this room who doesn't want to do justice.* That's why you're here.
>
> MR. CURRIE: Objection, Your Honor.
>
> THE COURT: I'm going to sustain.
>
> MR. HILL: All right. *You're here to do justice.*
>
> MR. CURRIE: Objection, Your Honor.
>
> THE COURT: Sustained.

12/2/2015RP 348 (emphasis added). This argument was misconduct.

This case differs from the decision in *State v. Anderson,* where it was determined that urging the jury to render a "just verdict" was not improper where the prosecutor discussed justice in the context of jury instructions. 153 Wn.App. 417, 424, 429, 220 P.3d 1273 (2009). In contrast to *Anderson,* here the prosecutor did not refer to the instructions or the facts of the case when he asked that the jury "do justice." Thus, unlike *Anderson,* the prosecutor's invocation of justice here was improper.

c. *The multiple instances of misconduct were prejudicial and there is a substantial likelihood that the misconduct affected the jury's verdict.*

Since Mr. Schipper objected to the repeated instances of misconduct here, he need only show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Allen*, 182 Wn.2d at 375; *State v. Emery,* 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

"[D]eciding whether a prosecuting attorney commit[ed] prejudicial misconduct 'is not a matter of whether there is sufficient evidence to justify upholding the verdicts.'" *Allen*, 182 Wn.2d at 376, *quoting Glasmann,* 175 Wn.2d at 711. "Rather, the question is whether

there is a substantial likelihood that the instances of misconduct affected the jury's verdict." *Glasmann,* 175 Wn.2d at 711.

Here, there was a substantial likelihood the misconduct affected the jury's verdict. As noted, Mr. Schipper admitted taking the beer with no intent on paying for it. He denied that his actions were consistent with robbery. The prosecutor's improper arguments were designed to undercut that defense by minimizing the State's burden of proof, vouching for the credibility of the witnesses who were claiming Mr. Schipper's actions constituted robbery and urging the jury to "do justice." Mr. Schipper was prejudiced by the prosecutor's improper argument.

In *Glasmann*, the defendant was charged with assault, robbery and kidnapping. He did not deny culpability, rather he argued he was guilty of only lesser included offenses. The Supreme Court reversed the defendant's convictions based upon the misconduct of the prosecutor in closing argument despite the fact the defendant did not object to the misconduct, finding a substantial likelihood the misconduct affected the jury's verdict. 175 Wn.2d at 712-14.

> Considering the entire record and circumstances of this case, there is a substantial likelihood that this misconduct affected the jury verdict. The principal disputed matter at trial was whether Glasmann was guilty of lesser offenses

> rather than those charged, and this largely turned on whether the requisite mental element was established for each offense. More fundamentally, the jury was required to conclude that the evidence established Glasmann's guilt of each offense beyond a reasonable doubt.

Glasmann, 175 Wn2d at 714. The same is true here.

Further, the cumulative effect of the misconduct was so prejudicial that only reversal of Mr. Schipper's convictions can remedy the error. The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect. *Case,* 49 Wn.2d at 73; *State v. Walker*, 164 Wn.App. 724, 737, 265 P.3d 191, 198 (2011).

Here, as in *Glasmann,* " '[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.' " *Id.* (alteration in original), *quoting Walker,* 164 Wn.App. at 737. Here, despite the fact the trial court sustained Mr. Schipper's objections, the misconduct was so pervasive that no instruction could remedy the prejudice.

Moreover, several federal courts have held that comments at the end of a prosecutor's *rebuttal* closing are more likely to cause

prejudice. *E.g., United States v. Sanchez,* 659 F.3d 1252, 1259 (9th Cir.2011) (significant that prosecutor made improper statement "at the end of his closing rebuttal argument, after which the jury commenced its deliberations"); *United States v. Carter,* 236 F.3d 777, 788 (6th Cir.2001) (significant that "prosecutor's improper comments occurred during his rebuttal argument and therefore were the last words from an attorney that were heard by the jury before deliberations"). Here, the prosecutor made several of his improper comments during his rebuttal closing, increasing their prejudicial effect. *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014).

The prosecutor's misconduct was pervasive and rendered Mr. Schipper's trial unfair. In light of the nature of the prosecutor's argument, there was a substantial likelihood the misconduct affected the jury's verdict. This Court should reverse Mr. Schipper's convictions and remand for a new trial.

2. The Court should exercise its discretion and deny any request for costs on appeal.

Should this Court reject Mr. Schipper's argument on appeal, he asks that this Court to issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency. Such as request is authorized under this Court's recent decision in *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair,* 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent "throughout the review" unless there is a finding that the defendant is no longer indigent. RAP 15.2(f). Here there has been no showing that Mr. Schipper's circumstances have so changed that he is no longer indigent.

In his declaration in support of his motion to pursue the appeal *in forma pauperis*, Mr. Schipper noted that he was not employed, did not own any real estate, stock or bonds, nor was he a beneficiary of any trust or other accounts. CP Supp ___, Sub No. 44 at 2-3. Mr. Schipper also stated he had no money in checking or savings accounts and owed approximately $2,500 in credit card debt. *Id.*

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an "individualized inquiry." *Id.* at 391, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Because of his current and presumed continuing indigency, Mr. Schipper asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Mr. Schipper asks this Court to reverse his convictions and remand for a new trial. Alternatively, Mr. Schipper asks this Court to exercise its discretion and deny the costs on appeal due to his continued indigency.

DATED this 10th day of August 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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DIVISION TWO

STATE OF WASHINGTON, Respondent, v. JAMIN SCHIPPER, Appellant.	)))))))))	NO. 48504-4-II

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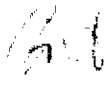

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